No. 89-553

In the Supreme Court of the United States

OCTOBER TERM, 1989

ROBERT C. GUCCIONE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

The complaint in this case alleges that an FBI operative committed intentional torts while he was "employed or otherwise engaged" by the FBI, and that "all acts complained of" constituted "services" he "rendered" to the United States "under the control and supervision of the FBI and its special agents." The question presented is whether the "intentional tort exception" to the Federal Tort Claims Act, 28 U.S.C. 2680(h), bars a claim for negligent supervision of that operative.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A3-A18) is reported at 847 F.2d 1031. The opinion of the court of appeals issued upon denial of rehearing (Pet. App. A19-A21) is reported at 878 F.2d 32. The opinion of the district court (Pet. App. A22-A68) is reported at 670 F.Supp. 527.

JURISDICTION

The court of appeals' judgment was entered on May 26, 1988, and a petition for rehearing was denied on July 6, 1989 (Pet. App. A1-A2). The petition for a writ of certiorari was filed October 4, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Because the district court ruled on the basis of the pleadings, the allegations of the complaint must here be taken as true. The complaint alleges that in the late 1970s, Melvin Weinberg, as the FBI's central operative in the ABSCAM investigation, committed a series of intentional torts against petitioner in the course of that investigation. Those alleged torts include defamation, misrepresentation, and interference with contract rights (Compl. ¶¶ 4, 13, C.A. App. 9, 10-11). In particular, petitioner alleged that the FBI, through Weinberg, attempted to induce him to commit crimes in connection with his efforts to open a gambling casino in Atlantic City. Petitioner claims that when he rebuffed these attempts, Weinberg embarked on a campaign of intentional torts designed to induce such crimes. Thus, it is alleged that "Weinberg engaged in a series of intentional, wrongful acts including * * * defaming [petitioner], interfering with [petitioner's] business venture [the proposed casino], and making false and unfounded representations concerning [petitioner's] integrity and character * * * " (Compl. ¶ 13, C.A. App. 10-11).

The complaint further alleges that Weinberg committed those torts while "employed or otherwise engaged" by the FBI as an FBI "operative" on an ongoing basis, and that all his alleged acts constituted "services" he "rendered" to the United States (Compl. ¶ 5, C.A. App. 9; see also Compl. ¶¶ 8, 11-13, C.A. App. 9, 10-11). In addition, Weinberg's supervising FBI agents are alleged to have participated in Weinberg's torts, in that he allegedly acted with their full knowledge, cooperation, assistance, and direction (Compl. ¶¶ 8, 11, 13, C.A. App. 9, 10-11).

As a proximate result of these intentional torts, it is alleged, petitioner was unable to secure sufficient loans to complete his partially constructed gambling casino, resulting

in losses in excess of $400 million (Compl. ¶ 14, C.A. App. 11).

2. The district court ruled against petitioner on two independent grounds: First, it dismissed the complaint on the basis that the action was barred by sovereign immunity under the intentional tort exception to the FTCA, 28 U.S.C. 2680(h) (Pet. App. A25-A46). Although petitioner's claims were pleaded in negligence, the court held that they were claims "arising out of" the alleged intentional torts of the FBI operative and were therefore barred by the intentional tort exception. In its view, the factual question whether Weinberg technically was an "employee" of the federal government did not have to be resolved, because "by the plain language of [petitioner's] complaint, Weinberg's relationship with the FBI during his ABSCAM activities was either that of an employee within the meaning of the [FTCA], or at least that of an independent contractor" (*id.* at A40-A41), and in either case relief would be barred. "Finally, regardless of the label that is applied to Weinberg's employment relationship with the FBI, all circuits that have considered the matter have held that the intentional tort exception of the FTCA covers intentional torts by informants or undercover operatives and that this limitation cannot be circumvented by allegations that these individuals were negligently supervised or controlled" (*id.* at A43 (citing cases)).

Second, the district court granted summary judgment for the government on the independent ground that the action was time-barred (Pet App. A46-A47): "[I]t is beyond dispute that [petitioner] knew [or] should have known the critical facts of his claim by at least March 1982, if not well before that. Thus, [petitioner's] initiation of this action on November 28, 1984 was unquestionably untimely under the applicable two year statute of limitations" (*ibid.*). "[E]ven under the most liberal statute of limitations rule poten-

tially available to [petitioner] on his FTCA claim, this claim has not been timely made" (*id.* at A67-A68).

3. The court of appeals affirmed on sovereign immunity grounds, finding it unnecessary to reach the statute of limitations issue (Pet. App. A18). The court first recognized that the "negligent supervision" claim is a familiar pleading device for plaintiffs attempting to evade the reach of the intentional tort exception, one that the Second Circuit as well as others have consistently rejected (*id.* at A9-A10 (citing cases)). The court then rejected petitioner's attempt to avoid the reach of those decisions. The court agreed with the district court that it was unnecessary to determine whether Weinberg was technically an employee of the United States, because it was undisputed that he had some relationship with the United States and "was certainly acting on the Government's behalf as an undercover operative carrying out the Abscam investigation. The language of [petitioner's] complaint itself furnishes a sufficient basis for barring his claim * * * : '[T]he FBI employed or otherwise engaged Melvin Weinberg to assist in the [Abscam] investigation as an informant and operative, and Weinberg rendered his services, including all acts complained of herein, while under the control and supervision of the FBI and its special agents' "(Pet. App. A16 (quoting Compl. ¶ 5) (brackets in original).

The court also found inapplicable the evolving "independent affirmative duty" exception to the intentional tort exception: "The mere fact that Guccione was the subject of an undercover investigation by the FBI gave rise to no special 'affirmative duty' to protect Guccione independent of the Government's duty to supervise its agents" (Pet. App. A17). To find such a duty in every case in which the government carries out its basic functions "would create an exception that would swallow the rule of section 2680(h)" (*ibid.*). "The present case is not one in which a plaintiff has been placed in the care or custody of the Government and

thereafter suffers harm as a result of the negligent performance of a duty of protective care that the plaintiff was entitled to rely upon," and so "[w]hatever the ultimate contours of the affirmative duty doctrine, it is unavailable to Guccione under the circumstances of this case" (*id.* at A17-A18).

4. Petitioner filed a petition for rehearing, relying on this Court's decision in *Sheridan* v. *United States*, 108 S. Ct. 2449 (1988), which was decided after the court of appeals' initial decision. The court, in a brief opinion denying the petition (Pet. App. A19-A21), held that *Sheridan* does not require a different result. In *Sheridan*, the tortfeasor-assailant's employment status "ha[d] nothing to do with the basis for imposing liability on the Government" (108 S.Ct. at 2455), and so the alleged negligence of three naval corpsmen in permitting him to leave a naval hospital with a weapon in his possession was "entirely independent of [the assailant's] employment status" (*ibid.*). Here, by contrast,

> Weinberg's role in relation to the United States is at the heart of Guccione's claim. * * * [T]he only duty possibly owed to Guccione by the Government agents with responsibilities for the Abscam investigation was to exercise reasonable care in the supervision of those persons acting in some way to carry out the governmental objectives of that investigation. Weinberg, unlike the assailant in *Sheridan*, was carrying out the Government's business during the episode in which he allegedly injured the tort plaintiff, even though he may have exceeded the bounds of proper conduct in the particular way he chose to carry out his assignment. Any negligent supervision * * * is not "entirely independent" of the relationship between Weinberg and the United States, whether or not Weinberg's status was technically that of an "employee." * * *

Pet. App. A20-A21.

ARGUMENT

There are two issues raised by this case. The first is whether Weinberg was an "employee of the Government" for purposes of the application of the Federal Tort Claims Act. This issue does not warrant review by this Court, because petitioner's own allegations that the government "controlled and supervised" Weinberg with respect to "all acts complained of" strongly support the conclusion, to which petitioner cites no contrary authority, that Weinberg should be treated as an employee for FTCA purposes. In any event, the question whether such treatment is appropriate is at most a question about the application of the statutory definition of "employee of the government" to the particular and unusual facts pleaded in this complaint. That question does not warrant this Court's review.

The second issue is whether, if Weinberg is to be treated as an "employee of the government" for FTCA purposes, petitioner's "negligent training and supervision" claim is barred by the intentional tort exception to the FTCA. To the extent that this issue was unresolved in *Sheridan*, this case presents an unsuitable vehicle for reaching it because of the presence here of the fact-bound disagreement between the parties concerning whether Weinberg is an employee of the government for purposes of the FTCA. In addition, it would be appropriate to permit the lower courts to apply the *Sheridan* framework in a variety of factual circumstances before concluding that review of this question by this Court is necessary.[1]

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[1] To date, no court of appeals has ever held, in a case involving an intentional tort in which "all acts complained of" constituted "services" "rendered" by an operative to the government (Compl. ¶ 5, C.A. App. 9), that the government could be held liable for negligent training or supervision of the operative.

1. Petitioner in this case pleaded what the court of appeals termed a "mixed" claim of intentional tort (by Weinberg) and negligent training and supervision (by Weinberg's supervisors) (Pet. App. A9). *Sheridan* v. *United States*, 108 S.Ct. 2449 (1988), teaches that the first step in determining whether such a claim is barred by the intentional tort exception to the FTCA is to decide whether, absent the exception, the intentional tort claim itself would fall within the FTCA's waiver of sovereign immunity. As the *Sheridan* Court stated, if the alleged intentional tort "could not provide the basis for a claim under the FTCA, the exception could not apply" (*id.* at 2455).

a. A critical issue concerning the applicability of the FTCA—absent the exception—to the intentional torts alleged in this case concerns the status of Weinberg (the alleged intentional tortfeasor) as government employee. The basic waiver of sovereign immunity in the FTCA applies to claims "for injury or loss of property * * * caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." 28 U.S.C. 1346(b). In turn, the Act provides that "employee of the government" includes "persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation." 28 U.S.C. 2671. Thus, unless the alleged tortfeasor was acting as an employee pursuant to this definition, the claim could not come within the coverage of the FTCA.

Although the court of appeals did not squarely rule on this issue, it did say that Weinberg "was certainly acting on the Government's behalf as an undercover operative" (Pet. App. A16). And the complaint in this case provides ample support for the conclusion that Weinberg should be treated as an "employee of the Government" for purposes of the FTCA. In the terms of the complaint, Weinberg "rendered

his services, including all acts complained of herein, while under the control and supervision of the FBI," while "employed or otherwise engaged" by the FBI (Compl. ¶ 5, C.A. App. 9). He "posed as the agent of a fictitious * * * company * * *, at the direction * * * of the FBI" (Compl. ¶ 8, C.A. App. 9), and he "undertook to persuade plaintiff to commit illegal acts" while "acting * * * with the full knowledge, acquiescence, support, cooperation, assistance, and/or direction of his supervising FBI agents" (Compl. ¶ 11, C.A. App. 10). Cf. *Logue* v. *United States*, 412 U.S. 521 (1973) (relevance of control test under FTCA).

b. In the face of his own straightforward allegations, relied upon by both courts below, petitioner asserts that "on this record, it must be assumed that Weinberg was not an employee of the United States government" (Pet. 26). Petitioner cites no authority in support of this proposition, nor does he make any effort to demonstrate why the definition of "employee of the Government" in 28 U.S.C. 2671 would not apply to the facts as he pleaded them. Instead, he simply cites statements made by the government in another case, a case to which he was not a party and in which the definition found in 28 U.S.C. 2671 was not at issue (Pet. 2 n.1).[2] In short, petitioner advances no argument in support of his contention that Weinberg was not an employee under the FTCA or that the application of the controlling legal

[2] The statement cited by petitioner was made in a case in which Weinberg claimed he was entitled to additional compensation as a government employee for his services in connection with the Abscam cases. C.A. App. 94-95. The government attorney in that case made the cited statement while arguing that the controlling statute was 5 U.S.C. 2105, a statute that defines "employee" as an individual who was, *inter alia*, "appointed in the civil service" by certain specified individuals and "subject to the supervision of" one of those individuals. The definition in 5 U.S.C. 2105, which differs dramatically from the definition in 28 U.S.C. 2671, has no relevance to petitioner's claim.

standard to the unusual facts of this case, as pleaded in his complaint, warrants review by this Court.

2. Congress excluded from the limited waiver of sovereign immunity in the Federal Tort Claims Act "[a]ny claim arising out of * * * libel, slander, misrepresentation, deceit, or interference with contract rights" (28 U.S.C. 2680(h)).[3] Ever since the Act was passed, however, litigants have attempted to circumvent its exceptions by alleging that the harm was caused not by an act for which sovereign immunity remained a bar, but rather by antecedent negligence. These attempts have generally failed, because the courts have looked to the essence of the claim rather than the way it was framed in the complaint. See cases cited at Pet. App. A8-A10. See also *United States* v. *Shearer*, 473 U.S. 52, 54-57 (1985) (plurality opinion); *Hughes* v. *United States*, 662 F.2d 219 (4th Cir. 1981).

a. "[A]ll acts complained of" here arose out of intentional torts committed by an FBI operative alleged in the complaint to have been "employed or otherwise engaged" to assist in an FBI investigation. Furthermore, these acts were alleged to be part of the "services" he rendered to the United States (Compl. ¶ 5, C.A. App. 9). Accordingly, this case is on a par with the numerous cases in which the courts have rebuffed attempts to transform clearly-barred *respondeat superior* claims into non-barred "negligent supervision" claims.

b. As the court of appeals held, the result in this case is not called into question by the reasoning or result in *Sheridan*. In stark contrast to the allegations of this com-

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[3] The 1974 amendment limiting the reach of the intentional tort exception for certain other intentional torts, like assault and battery, committed by law enforcement officers is inapplicable here, because the torts complained of do not come within the terms of the amendment (Pet. App. A30 n.1).

plaint, the "off-duty, inebriated" employee in *Sheridan*, who shot and wounded passersby on a public street, was explicitly held to be "not acting within the scope of his office or employment" (108 S.Ct. at 2455). Moreover, the "good Samaritan" duty owed by the government in *Sheridan* had "nothing to do with" and was "entirely independent of" the intentional tortfeasor's status as an employee of the United States. *Ibid.* In contrast, Weinberg's relationship to the United States is critical and, based on petitioner's own allegations, is inextricably intertwined with the alleged tortious acts. Absent that relationship, there would be no basis for the claimed duty to supervise. Petitioner's claim merely reformulates, in the language of negligent supervision, a claim that is based directly on the alleged intentional torts of a federal operative functioning on the government's behalf. Such pleading artistry remains precluded by Section 2680(h), as it has been since the FTCA was adopted.

c. The decision in *Panella* v. *United States*, 216 F.2d 622 (2d Cir. 1954), cited by petitioner in support of his assertion that "mixed" claims are not barred by the intentional tort exception, in fact establishes precisely the opposite proposition in cases in which the intentional tortfeasor is an "employee of the Government" under the FTCA. In the *Panella* opinion, then-Judge Harlan discussed a hypothetical claim very much like that of petitioner, in which "a person is assaulted by a government employee who becomes angered about a matter within his jurisdiction" (*id.* at 624). He reasoned that "[s]ince in the absence of § 2680(h) the assault * * * might give rise to an action against the Government without any showing of negligence, it is not difficult to imply that the § 2680(h) exception was intended to exonerate the Government from all liability of this nature, no matter what the form of the action" (*ibid.*). The legislative history of the FTCA directly addresses the impact of the statute in a similar example; Congress was

informed by the Department of Justice that the intentional tort exception would apply where "some agent of the Government gets in a fight with some fellow * * * [a]nd socks him." *Tort Claims: Hearings on H.R. 5373 and H.R. 6463 Before the House Comm. on the Judiciary*, 77th Cong., 2d Sess. 33 (1942), cited in *United States* v. *Shearer*, 473 U.S. 52, 55 (1985) (plurality opinion).

d. Petitioner asserts that the Second Circuit's decision in this case conflicts with decisions of the Ninth Circuit in three cases (Pet. 42-47). But none of those cases involved federal employees who rendered "services, including all acts complained of * * * [by the plaintiff], while under the control and supervision" of the government (Compl. ¶ 5, C.A. App. 9). In *Kearney* v. *United States*, 815 F.2d 535 (9th Cir. 1987), a soldier who had escaped from custody sexually abused and murdered a civilian. Unlike this case—and like *Sheridan*—the crime in *Kearney* plainly had nothing to do with the soldier's duties as government employee. The court noted, in a passage immediately following the passage quoted by petitioner (Pet. 45-46), that "[e]ven if Congress intended to distinguish between the imposition of liability for the government's negligence in its supervision of employees [and] the imposition of liability for the government's negligence in its supervision of nonemployees, imposition of liability is proper in this case because [the soldier's] status was that of a prisoner." 815 F.2d at 537. *Kearney* is thus much closer to *Panella* v. *United States*, *supra*, *United States* v. *Muniz*, 374 U.S. 150 (1963), and a line of other cases involving prisoners than to the present case. See also *Bennett* v. *United States*, 803 F.2d 1502, 1503 (9th Cir. 1986) (kidnap, assault, and rape of several children at Bureau of Indian Affairs boarding school by an off-duty teacher). The third case cited by petitioner, *Knappick* v *United States*, 875 F.2d 318 (9th Cir. 1989) (Table), is an unpublished opinion involving the special circumstances

raised when the victim of the tort is a prisoner dependent on the government for protection.

3. As both lower courts held, the Federal Tort Claims Act precludes the federal courts from exercising subject matter jurisdiction over petitioner's claim.[4] To a large extent, this holding was based on particular allegations made in petitioner's own complaint, and the question whether, in light of those allegations, Weinberg was an "employee of the Government" does not warrant review by this Court. Both on this point and on the issue of the applicability of the intentional tort exception to claims of negligent training and supervision of a government employee, the decision below is fully consistent with decisions of this Court and with the legislative history of the FTCA, and does not conflict with decisions of any other circuit. Accordingly, further review is not warranted.

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[4] Since petitioner's grievances have already been called to the attention of Congress and have been the subject of comment by a Senate Committee, Congress may be receptive to a request for enactment of a private bill compensating petitioner, if indeed justice so demands. See *Final Report of the Select Committee to Study Undercover Activities of Components of the Department of Justice to the United States Senate*, S. Rep. No. 682, 97th Cong., 2d Sess. (1982), part F (duplicated at C.A. App. 129-135). The facts concerning Weinberg's activities with respect to Guccione recited in this congressional report and quoted extensively by petitioner in stating this case (Pet. 4-9), have never been subject to adversary testing or proven in a court of law.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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